In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1244

JAMES W. BRUNDAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the Court of Claims' holding that his suit was barred by laches.

1. On July 8, 1968, petitioner was chosen for promotion to the grade of temporary Major in the Air Force. On August 5, 1968, another selection board considered, but did not select, petitioner for promotion to the grade of permanent Major. Because this was petitioner's second deferral of permanent promotion,[1] he was discharged as required by 10 U.S.C. 8303.

Prior to his discharge, petitioner applied to the Air Force Board for the Correction of Military Records on October 11, 1968. He sought to have the August 5, 1968, non-selection expunged from his record, alleging that due to administrative error the selection board had not been apprised of his earlier promotion to temporary Major.

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[1]Petitioner previously had been passed over for promotion on November 19, 1966.

The Board denied the application on November 19, 1968, stating that petitioner had failed to establish probable error or injustice. On March 31, 1969, petitioner was discharged (Pet. App. 1a-2a).

On December 8, 1972, more than three years and eight months after his discharge, petitioner filed suit in the Court of Claims. He again sought an order directing the Air Force to amend its records to show that he was promoted to permanent Major. He also requested active duty pay from the date of his discharge. On January 26, 1973, petitioner asked the court to suspend proceedings while he reapplied to the Board. On August 6, 1973, the Board denied his application for reconsideration. On the government's motion for summary judgment, the Court of Claims dismissed petitioner's suit, holding that it was time-barred because of laches (Pet. App. 1a-10a).

The court concluded that the two requisites of laches—unreasonable delay in the assertion of a right, and prejudice to the defendant because of the delay—were present here. The court found that petitioner "unreasonably and inexcusably delayed for a period of three years and eight months before asserting his rights in the commencement of this litigation" (Pet. App. 8a), and the delay prejudiced the government in several respects. First, the court observed, even if no one was selected to replace petitioner his recovery here "would require the Government to pay him the salary of a Major for a period of over five and a half years, during which time no work was done, and during which time he had ample opportunity to fully assert his claim" (Pet.

App. 8a-9a; footnote omitted).[2] The court also concluded that the government's defense would have been hampered. Petitioner's theory depended on an assertion that the Permanent Major Board was unaware of the action of the Temporary Major Board. Colonel Worthington, who made a record notation to the contrary at the time promotion was denied, had by 1973 lost all memory of the events. If petitioner had brought suit earlier, Colonel Worthington's memory might have been preserved (Pet. App. 9a). So, too, a critical document that might have established or refuted petitioner's claim had been routinely destroyed (*ibid.*). Consequently, the court concluded that petitioner had "waited until it was too late in the day for a speedy, fair and exact determination of the truth" (Pet. App. 10a).

2. The Court of Claims' decision involves only the application of settled principles to particular facts, and presents no question warranting review by the Court.

Petitioner contends that laches should not have been applied to his case because the doctrine had been "forgotten or abandoned" in military pay cases for almost fifty years prior to *Cason* v. *United States*, 461 F.2d 784 (Ct. Cl.) ("*Cason I*"), and that petitioner relied

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[2]The Court of Claims properly discounted petitioner's claim (Pet. 4-5) that laches should not be applied to a layman. All litigants are under an obligation to vindicate their rights in a fashion that does not disadvantage their adversaries. Petitioner's claim was one which, if vindicated, would produce an ample fund out of which to reimburse counsel; petitioner has not alleged that he was unable to afford counsel, and he in fact retained counsel in May 1971, one year and seven months before he filed the instant suit. Finally, this is not a case in which a layman was ignorant of the alleged wrong done him or the possibility of redress. Petitioner sought relief even before he was discharged, and has offered no explanation other than neglect for his failure to commence judicial proceedings.

upon "the existing practice that laches did not apply to military pay cases" (Pet. 5-7). Petitioner also maintains that the Court of Claims made "due allowance" for such reliance in *Cason* v. *United States*, 471 F.2d 1225 (Ct. Cl.) ("*Cason II*"), and should have accorded him similar treatment (Pet. 6-7, 10).

These contentions were not raised below. Petitioner expressly conceded in the Court of Claims that laches is applicable to military pay cases (Pet. App. 5a). Accordingly, review of those contentions by this Court is inappropriate. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, the Court of Claims properly applied the doctrine of laches to petitioner's claim.

a. As petitioner recognizes, the Court of Claims applied the doctrine of laches to military pay cases in reported decisions in 1923 and 1928. *Plunkett* v. *United States*, 58 Ct. Cl. 359; *Chamberlain* v. *United States*, 66 Ct. Cl. 317, certiorari denied, 279 U.S. 845. Numerous Court of Claims cases later invoked laches where plaintiffs sought back pay or reinstatement because of illegal discharge from civilian Federal service. See, *e.g.*, *Grisham* v. *United States*, 392 F.2d 980 (Ct. Cl.), certiorari denied, 393 U.S. 843; *Jackson* v. *United States*, 179 Ct. Cl. 29, certiorari denied, 389 U.S. 985; *Alpert* v. *United States*, 161 Ct. Cl. 810. Although in recent years preceding *Cason I* the Court of Claims had no occasion to apply laches to a military pay case, it did not intimate that laches would *not* continue to be applicable, when appropriate, in such cases. *Cason I* reaffirmed the longstanding practice and did not change the law. Applying the *Cason I* principles here, the Court of Claims properly concluded that laches was applicable in view of petitioner's lengthy delay in

filing suit and the substantial and demonstrable prejudice the delay caused.[3]

b. Petitioner's claim that the Court of Claims should have declined to apply laches in his case, as it declined to apply laches on reconsideration in *Cason II*, is unpersuasive. The reconsideration of that case was explained by the Court of Claims on several grounds, none of which is applicable here. Contrary to petitioner's assertion (Pet. 6, 10), rehearing was granted in *Cason II* not because *Cason I* was "revolutionary," but because of "the possible unfairness to plaintiff's position" due to the fact that one of his legal memoranda "was never distributed to the judges of this court" (471 F.2d at 1226). The *Cason II* court also concluded that laches had not been established because the government "has made no attempt to substantiate that it was in fact in any specific manner prejudiced by plaintiff's delay" (*id.* at 1229). The court held that "[w]ith a minimal showing of injury," plaintiff's delay "would have mandated application of laches except for the desuetude factor" (*id.* at 1230).

In the instant case, the court fully considered the principles enunciated in *Cason II* (Pet. App. 4a-8a), but held that, in contrast to *Cason II*, petitioner's inaction here specifically prejudiced the government in a number of concrete ways. This disposition was sanctioned by the

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[3]Petitioner also asserts that the doctrine of laches contravenes the statute of limitations and that it must be treated with great caution (Pet. 7). But a statute of limitations is merely the outer limit within which a suit may be brought, and it is well established that laches may bar an action even though it was brought within the statute of limitations. See, *e.g.*, *Holmberg* v. *Armbrecht*, 327 U.S. 392.

principles of *Cason II* and fully within the discretion of the Court of Claims.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[4]Petitioner's final contention—that the court erred in denying his application for an *en banc* hearing (Pet. 10)—is not an appropriate ground upon which to seek certiorari. The grant of a rehearing *en banc* under Court of Claims Rule 7(b) is discretionary, and only the Court of Claims can determine when such extraordinary action is necessary. See *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 624-625.